

Service Date: December 23, 1993

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER Of the Application of) TRANSPORTATION DIVISION
MCGREE TRUCKING, INC., Butte, Montana)
for a Montana Intrastate Certificate) DOCKET NO. T-93.122.PCN
of Public Convenience and Necessity.) ORDER NO. 6267a

ORDER DENYING MOTION FOR RECONSIDERATION

BACKGROUND

1. On August 24, 1993 McGree Trucking, Inc. (Applicant), Butte, Montana, filed its application with the Montana Public Service Commission (Commission) for a Class D certificate of public convenience and necessity to haul garbage and recyclables in Jefferson and Powell Counties. The application was duly noticed by publication in the newspapers Montana Standard and Boulder Monitor, and was mailed in the September Monthly Notice to all Montana intrastate carriers on September 8, 1993, pursuant to routine Commission practice.

2. On September 29, 1993 the Commission received a faxed request from Paul Cooley on behalf of Browning Ferris Industries (BFI) for an application form for a certificate of public convenience and necessity.

3. On October 1, 1993 BFI filed a protest against the application of McGree Trucking, Inc., on the grounds that BFI could better meet the public need and convenience.

4. Applicant filed a Motion to Dismiss BFI's protest on October 5, 1993, on the ground that BFI does not hold authority to serve Powell or Jefferson Counties and therefore does not have standing to protest. The Applicant cited Commission precedent that failure to hold authority in the area applied for results in a lack of standing as a protestant. The Commission granted this motion to dismiss.

5. On October 25, 1993 the Commission received BFI's counsel's correspondence "encouraging" the Commission to conduct a hearing on its own initiative. The letter referred to BFI's pending application for the same counties and the fact that the same shipper supporting McGree also supports BFI. The letter asserted that there was no "actual shipper support" without actual contracts with Powell County.

6. Applicant amended its application withdrawing proposed service to Jefferson County. Protestants with authority in Jefferson County but not Powell County withdrew their protests. At its publicly noticed business meeting held November 3, 1993, the Commission acted on the application as amended. The Commis-

sion then issued Order No. 6267 on November 16, 1993 granting Applicant a Class D certificate of public convenience and necessity for garbage and recyclables between all points and places in Powell County.

7. On November 24, 1993 the Commission received a Motion for Reconsideration and supporting brief from BFI. The Commission denied this motion following a work session on December 2, 1993 which was noticed on the weekly business meeting notice, mailed to the Motor Carrier Association, Montana Solid Waste Contractors Association, and all motor carriers requesting notice; and placed on the State's Electronic Bulletin Board.

FINDINGS AND DISCUSSION

8. BFI first filed its protest under contested case proceedings, §§ 2-4-601 et seq., MCA, under the Montana Administrative Procedure Act (MAPA). The Commission dismissed the protest for lack of standing in a contested case proceeding, and subsequently issued a default order for Powell County because there were no protestants.

9. Following the default order, BFI filed its Motion for Reconsideration under §§ 2-3-101 et seq., MCA, as an "interested person," alleging that the Commission had failed to give inter-

ested persons an opportunity to submit data and arguments before the default order. BFI also alleged that the decision was made in an illegally closed meeting, in violation of § 2-3-203, MCA, thus voiding the decision pursuant to § 2-3-113, MCA. BFI requested that the Commission reconsider the default decision and conduct a hearing.

10. In examining the procedures in this application, the Commission finds that this matter followed a routine course. BFI itself has received a number of default authorities under the same set of procedures. The Commission notified all carriers of the application by mailing the monthly notice. It also notified the public by legal publication in the newspapers of general circulation in the two affected counties, Powell and Jefferson. BFI received the notice and filed its protest, stating that the application was "not required to meet the public's (sic) need and convenience, and that BFI can serve the public need and convenience better...."

11. As the Commission consistently has done when a protestant does not have authority in the area of the application, it dismissed the protest upon Applicant's motion. In correspondence received October 25, 1993, BFI's counsel encouraged the Commission to conduct a hearing on its own initiative. Counsel mistak-

only associated the requirement for actual shipper testimony at a hearing under contested case procedures with a nonexistent requirement for actual shipper contracts appended to an application. BFI's counsel advised the Commission that neither BFI nor McGree have actual contracts.

12. Commission staff responded to BFI's correspondence on October 26, 1993, stating that the letter would be submitted to the Commission. The Commission has discretion on its own motion to schedule a hearing. However, the staff correspondence pointed out that an existing contract between a shipper and a Class D applicant is not required for an application. Furthermore, a shipper can support more than one application.

13. McGree amended its application to delete Jefferson County. Protestants with authority for Jefferson County withdrew from the case. Without viable protests, the Commission proceeded in its routine manner to grant the application for Class D authority for Powell County at a regularly scheduled session, open to the public and noticed on the weekly business notice and at the open weekly business meeting.

14. The Commission takes administrative notice that BFI recently received very similar default orders granting Class D authority where there were no protestants with standing in Docket

Nos. T-93.102.PCN (Seeley Lake Refuse District Transfer Stations) and T-93.95.PCN (Town of Philipsburg and a three-mile radius). Both these default authorities were granted at an open meeting on October 4, 1993 and the orders were issued October 26, 1993. BFI is knowledgeable on the procedures of the Commission and has benefitted from default grants upon the same procedures. If BFI prevailed in its claim that the Commission meetings are illegally closed, thereby voiding the default decisions, the result would be to void most of the authorities granted at the Commission. The Commission finds that this result is not warranted as its process is open and its meetings are in compliance with the open meeting requirements in §§ 2-3-201 et seq., MCA.

15. In its Motion for Reconsideration filed November 24, 1993, BFI moved the Commission to revoke the order granting McGree the Class D authority without a hearing. BFI requested a "hearing on the issue of actual shipper need." In its Brief in Support, BFI argued that a public hearing was required pursuant to § 2-4-104(3), MCA, or a contested case procedure, pursuant to § 2-3-104(2), MCA. BFI argued that "the PSC must give the 'interested persons' an opportunity to submit data and arguments" before a final decision. Alleging that the Commission did not deliberate in an open meeting on whether to conduct a hearing,

BFI maintains that a district court may declare the decision void under § 2-3-213, MCA, and award fees under § 2-3-221, MCA.

Further, BFI raises the specter of reversal by the district court upon judicial review if the decision violates the constitution or statutes or was made upon unlawful procedure. BFI concludes that the Commission should "reconsider its closed decision not to conduct a hearing in that failure to reconsider will subject the PSC to litigation and exposure to BFI's fees and costs." The Commission chooses not to consider this request threatening and acknowledges that BFI is entitled to all its legal remedies.

16. BFI has based its claims upon two faulty premises: (1) that the Commission's decision not to conduct a hearing was made in a closed meeting; and (2) that the same participation rights follow from the open meeting requirements as from the contested case proceedings. The Commission finds that BFI is in error. From the initial filing of McGree's application, every step has been noticed and the public has had the opportunity to participate and make appropriate submissions to the Commission. The file in this matter is replete with submissions, arguments and correspondence from BFI. When BFI was denied standing as a protestant in a contested case proceeding, it returned as an interested member of the public, claiming that it did not have

the opportunity to participate in an open meeting before the Commission issued its default order.

17. BFI had full notice and the opportunity to participate in the contested case proceeding, had BFI had standing, i.e., a legally protectable interest in the form of existing authority. The weekly business meeting was noticed and the public could observe the Commission deliberating on whether to conduct a hearing or grant the default order. There is no requirement under §§ 2-3-201 et seq., MCA, that the public can participate beyond observation. The action at an open business meeting does not come under the contested case requirements. Further, in contested case procedures or other open meetings, the public does not participate in the deliberations. A meeting is one in which a quorum of the agency can hear, discuss or act on a matter under its jurisdiction. § 2-3-202, MCA. An "open" meeting means that the actions and deliberations are conducted openly and with notice. § 2-3-201, MCA.

18. The Commission finds that BFI's Motion to Reconsider must be denied. There is no basis for its claims that the Commission acted in a closed meeting or that BFI had the right to participate in the deliberations. The business meeting November 3, 1993 was noticed and open to the public. Because there were

no viable protestants in the Docket, the Commission properly granted the application by default. If BFI believes that this authority should be revoked or that there should be a hearing on the issue of need, BFI calls into question its own and all the other authorities granted by default when there are no viable protestants. The Commission notes that when BFI realized there was a public need for the proposed service, it made its application for the same counties. BFI's application is protested by McGree and will likely go to hearing. BFI can make its arguments and submissions on fitness and competition in that Docket.

CONCLUSIONS OF LAW

19. The Montana Public Service Commission properly exercises jurisdiction over the parties and subject matter of this proceeding, pursuant to Title 69, Chapter 12, Montana Code Annotated (MCA).

20. The Commission afforded legally required notice and opportunity to participate in the contested case proceeding pursuant to Title 69, Chapter 12, MCA and Title 2, Chapter 4, Part 6, MCA (MAPA - contested case requirements).

21. The Commission properly dismissed BFI's protest in the contested case proceeding for lack of standing to challenge

McGree's application on the issue of public convenience and necessity, i.e., BFI did not have a Class D certificate in the counties of the application.

22. The Commission properly conducted an open meeting on November 3, 1993 pursuant to §§ 2-3-201 et seq., MCA, in deliberating on whether to grant the default to McGree without a hearing.

23. The Commission properly granted the default authority on the basis that there were no protestants with authority for Powell County and therefore no proper parties to contest the grant in a contested case proceeding.

ORDER

WHEREFORE, the Commission DENIES BFI's Motion for Reconsideration of Order No. 6267 granting the application of McGree Trucking, Inc. for a Class D authority in Powell County.

Done and Dated this 21st day of December, 1993 by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman

BOB ROWE, Vice Chairman
(Concurring Opinion Attached)

NANCY MCCAFFREE, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter.
 Judicial review may be obtained by filing a petition
 for review within thirty (30) days of the service of
 this order. Section 2-4-702. MCA

OPINION OF COMMISSIONER ROWE
(Docket No. T-93.122.PCN, Order No. 6267a)

I support the substantive result in this case, affirming the grant of authority to McGree Trucking. I also consider the Order on Reconsideration to be an extremely well-reasoned and thorough statement of the Commission's procedure in this and similar cases. The Commission acted in compliance with due process and statutory notice requirements. The Commission made its decision at a legal open meeting, as it does all decisions. I am aware of no administrative body more zealously concerned with open meetings, public notice, and scrupulous attention to the elements of administrative due process.

My sole concern is that, where a member of the public who is not a party requests it, some opportunity for written or oral public participation is consistent with Section 2-3-103(1), MCA, which requires that agencies "develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public." (Previously, BFI was determined under Commission rules not to have standing as a party. That determination is not at issue on reconsideration.)

The difficulty facing the Commission in such cases in part results from balancing the access to government obligations of the Public Participation in Governmental Operations Act with the formal contested case requirements of the Montana Administrative Procedure Act.¹ Potential conflicts involve the nature of sub-

¹ An interesting example of this tension is suggested by

stantial evidence, the due process right to confront and cross-examine, and hearsay limitations on the use of written submissions. However, at the least, members of the public who express a concern about a particular Commission proceeding should be afforded a minimal right to make those views known and considered.

RESPECTFULLY SUBMITTED this 21st day of December, 1993.

BOB ROWE
Vice Chair

Mountain Water v. P.S.C., Cause No. ADV-87-981, Montana First Judicial District (1988), in which public testimony was held to be an inadequate basis for disallowing expenses associated with executive compensation. The decision is subject to a number of interpretations concerning the role and use of public testimony.